

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

INTAGIO CORPORATION,

Plaintiff,

v.

TIGER OAK PUBLICATIONS, INC.,

Defendant.

No. C 06-3592 PJH

**ORDER DENYING MOTION TO
REMAND, GRANTING MOTION TO
STRIKE, DENYING MOTION TO
DISMISS, AND VACATING DEFAULT**

Plaintiff's motions to remand the action, and to strike and/or dismiss defendant's counterclaims, as well as counterdefendants' motions to remand, and strike and/or dismiss the counterclaims, came on for hearing before this court on September 12, 2007. Plaintiff, Intagio Corporation ("Intagio"), appeared through its counsel, Russell I. Glazer. Defendant, Tiger Oak Publications, Inc. ("Tiger Oak"), appeared through its counsel, James M. Dombroski. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby DENIES plaintiff and counterdefendants' motions to remand, GRANTS plaintiff's and counterdefendants' motion to strike defendants' counterclaims, and DENIES as MOOT plaintiff's and counterdefendants' motions to dismiss the counterclaims, for the reasons stated at the hearing, and summarized as follows.

1. Plaintiff's and counterdefendants' motion to remand the action for lack of subject matter jurisdiction is DENIED. Defendant's Notice of Removal clearly establishes a basis for finding that the requirements for diversity jurisdiction are satisfied, and plaintiff has failed to controvert the existence of diversity jurisdiction with any evidence of its own.

1 Moreover, to the extent defendant's First Amended Answer and Counterclaim appear to
2 deny the existence of subject matter jurisdiction, defense counsel satisfactorily explained at
3 the hearing on this matter that such denial was made with the sole purpose of preserving
4 defendant's objections with respect to the fundamental arbitrability of the instant action.

5 2. Plaintiff's and counterdefendants' motions to strike defendant's counterclaims
6 are hereby GRANTED. Defendant's opposition to the underlying Petition to Compel
7 Arbitration, filed on July 12, 2006, constituted defendant's original responsive pleading, as
8 indicated by defendant's detailed "factual response" therein setting forth the grounds for the
9 defenses and counterclaims asserted by defendant in its July 2, 2007 First Amended
10 Answer and Counterclaim. Accordingly, defendant's First Amended Answer and
11 Counterclaim is to be construed, as its title indicates, as a first amended pleading. As
12 such, and in view of the court's scheduling order granting the parties until July 2, 2007 to
13 seek leave to amend their pleadings, defendant's amended answer and counterclaims are
14 untimely, and violate Federal Rules of Civil Procedure 13, 14, and 15. Since plaintiff's and
15 counterdefendants' motions to strike target only defendant's counterclaims, however, it is
16 the counterclaims that are hereby STRICKEN, with prejudice, and defendant's answer is
17 permitted to stand as pled.

18 3. Plaintiff's and counterdefendants' motions to dismiss defendant's
19 counterclaims are hereby DENIED as MOOT, in view of the court's order striking the
20 counterclaims.

21 Additionally, having now considered the parties' supplemental briefing on the
22 question whether the August 16, 2007 entry of default as to counterdefendant Joseph
23 DiMarino is valid in view of the court's ruling herein, the court hereby VACATES the entry of
24 default as to Mr. DiMarino. Defendant's counterclaims against him are stricken in the
25 interest of justice, given the invalidity of those counterclaims (as stated above), and Mr.
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DiMarino's bankruptcy status.

IT IS SO ORDERED.

Dated: September 21, 2007



PHYLLIS J. HAMILTON
United States District Judge